

<b>OLAF or the Question of Applicability of Secondary Community Law to the ECB</b>
<b>Barbara Dutzler</b>
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<b>Keywords</b>
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<b>Abstract</b>
<p>On January 14 2000, the Commission sued the ECB on grounds of infringement of a regulation which concerns the investigations conducted by the European Anti-Fraud Office. This, for the time being, is the culminating point in the controversy between the Commission and the ECB, which reflects the still ongoing process of adaptation of the inter-institutional relationships to the changes which resulted from the commencement of the third stage of EMU, and of defining the ECB's powers.</p> <p>This article is intended to add to the discussion of the legal status of the ECB, which is indeed a highly controversial topic. The author concludes that the ECB, far from being a third party to the European Community (EC), or a 'new Community', is a highly developed instrument of the Community which was set up in order to help to achieve the Community's objectives.</p>
<b>Kurzfassung</b>
<p>Die Kommission klagte am 14. Jänner 2000 die EZB wegen Verletzung der Verordnung über die Untersuchungen des Europäischen Amtes für Betrugsbekämpfung (OLAF). Dies ist der derzeitige Höhepunkt in der Kontroverse zwischen EZB und Kommission, die erst verständlich wird, wenn man weiß, daß sie aus dem unklaren Status der EZB in der WWU herrührt. Insofern reflektiert die Rechtsstreitigkeit nur das Bemühen, die Grenzen der Macht der EZB zu definieren.</p> <p>Der vorliegende Artikel wurde in der Absicht geschrieben, zu der Diskussion um den rechtlichen Status der EZB beizutragen, der zur Zeit sehr kontrovers diskutiert wird. Das Hauptergebnis dieser Untersuchung ist, daß die EZB keineswegs eine "neue Gemeinschaft" oder ein von der Gemeinschaft getrennter Akteur ist, sondern ein hochentwickeltes Instrument zur Realisierung der Gemeinschaftsziele.</p>
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## 1. The OLAF Case <sup>↑</sup>

According to Art 280 Para 1 EC, both the Community and the Member States are responsible to counter fraud and to protect the financial interests of the Community. It is thus a shared competence, with the responsibility to protect the Community's financial interests lying primarily on the Member States. However, Para 4 of the said Article authorises the Council under the co-decision procedure, to 'adopt the necessary measures in the fields of prevention of and fight against fraud affecting the financial interests of the Community [...].' Under this provision, the Council issued a regulation which conferred upon the Commission the task to carry out on-the-spot checks and inspections concerning fraud and other irregularities.(1) The Commission, which according to Art 218 Para 2 EC can adopt its rules of procedure to cover the conduct of it and its departments in accordance with the provisions of the Treaty, set up an Office,(2) which was entrusted with exercising the powers conferred to the Commission by the Council under the said Regulation 2185/96.

The tasks of this office – OLAF(3) - comprise the exercise of both the *external administrative investigation powers* of the Commission and the *internal administrative investigations*. In the exercise of its tasks ,OLAF is independent from instructions of the Commission or any government, institution or other body.(4)

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The Commission set up OLAF by virtue of its powers of internal organisation. OLAF is thus an internal body of the Commission, based on its rules of procedure, with the Director appointed by the Commission. But although such measures of internal organisation according to the ECJ's case law

can have legal effects vis-à-vis third parties,(5) the Commission is only authorised 'to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration.'(6) Thus, it was not possible for the Commission to simply endow an internal body with the competence to conduct investigations, and hence the need for a Council Regulation specifying OLAF's powers vis-à-vis Member States and Community bodies and institutions. Under Regulation 1073/1999, based on Art 280 EC, the Council formally conferred upon OLAF the powers of investigation which previously were vested in the Commission. In particular, internally, OLAF may conduct, as long as it complies with the Protocol on privileges and immunities inspections, checks and other measures, which can comprise unannounced and immediate access to any information held by Community bodies and institutions, and to their premises, inspection of the accounts of the institutions and bodies, copy taking and requesting of oral information.(7) The bodies under review are called upon to assist the Office's agents in fulfilling their tasks,(8) and forward to the Office without delay any information relating to illegal activities.(9)

The problem with such far reaching internal investigation powers of OLAF is the 'principle of each institution's internal organisational autonomy'.(10) Therefore, each institution, body, office or agency was obliged under Art 4 Para 1 of the Regulation 1073/1999 to adopt decisions which should include rules concerning firstly a duty on the part of the staff of the said bodies to co-operate with and supply information to the Office, and secondly concerning the procedures which the Office's employees would have to observe when conducting internal investigations, and concerning the guarantees of the rights of persons concerned by such an investigation.(11) Other limits to the activities of the Office are Articles 286 relating to the protection of personal data, and Art 287 EC on the obligation of professional secrecy binding the members of all Community institutions, committees, officials and other servants.

Accordingly, the EP, the Commission and the Council signed an inter-institutional agreement, in which they agreed on a standard model which should be entered by all other institutions, and also by the bodies and offices and agencies established by or on the basis of the EC or the Euratom Treaty. (12) The standard model specifies the duty of the institution or body to co-operate with the Office, pass on relevant information and assist the Office's agents by their security office. As a principle, also the ECB is competent to enter into such an inter-institutional agreements should its tasks so require (Smits 1997 p.105).

All bodies entering the inter-institutional agreement should adopt the model decision without deviating from that model 'save where their own *particular requirements* make such deviation a technical necessity.'(13) To be concrete, the Commission underscored the importance of accepting the investigation rights of OLAF. But at the same time, the Commission agreed that the implementation of the regulation had to fully respect the rules laid down by the Treaties and the statutes of the ECB and the EIB with regard to their functional and institutional independence in carrying out their tasks, and accepted that ECB and EIB, and not only the Court of Justice, had such a particular requirement, evolving out of the need to respect the independence and specificity of these bodies. The Commission therefore opted for an arrangement similar to the one of the ECJ, which took a decision on 26 October 1999 in accordance with Art 4 of Regulation 1073/1999, to grant OLAF full access to all documents and information, except for those related to a law suit.(14) OLAF's powers were limited only insofar as the registrar of the ECJ serves as the interface between OLAF and ECJ. On the one hand, he is to be informed by ECJ officials and employees, and communicates relevant facts to OLAF, and on the other hand he has to be informed on any investigations by OLAF at the ECJ's premises. In any event, the duty to co-operate with OLAF is binding on the employees, so that in spite of its *particular requirements* the Court did not reserve any particular privileges for itself.

However, neither the suggestion of the Commission to have a similar arrangement, nor the invitation of the European Council at the Cologne summit to ‘consider as soon as possible the terms under which the Office may carry out internal investigations and also what form co-operation with the Office might take’(15) could prevent the ECB from issuing a decision on fraud prevention, under which it established the ECB Directorate for Internal Audit and denied OLAF access to its premises. (16) The EIB installed a similar arrangement. Consequently, the Commission considered the relevant decisions taken by both institutions not to be compatible with Regulation (EC) 1073/1999 of 25 May 1999,(17) and sued ECB and EIB.

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The Commission claims the said regulation to be applicable to the ECB, since the protection of the Community’s financial interests are not restricted to the protection of the Community budget, but also to budgets managed by the Communities and budgets of separate, decentralised Community organisations.(18) Accordingly, so the argument of the Commission, the ECB’s own budget and financial resources would not preclude the applicability to the ECB of the measures adopted under Art 280 Para 4 EC.

Both the ECB and the EIB denied the jurisdiction of the Commission's investigation agency to carry out investigations on their premises, since OLAF was set up on the basis of the Commission’s rules of procedure ‘among its own departments’, while neither bank was a department of the Commission. Hence, in the point of view of the ECB, the functional and institutional independence in carrying out its tasks and the budget and financial resources separate from those of the Communities impede any activity of OLAF on its premises.

With this case, the Court is given the opportunity to rule on the status of the ECB, since the ECB invoked the provisions concerning its independent status, which would not allow internal investigations by a body of the Commission. Hence, it seems opportune at this stage to discuss the arguments adduced by the proponents of the separate status of the ECB as a third party to the Community.

## 2. The Legal Status of the ECB <sup>↑</sup>

To be concrete, it has been argued by high officials of the European System of Central Banks (ESCB)(19) – supported by academic writings on this issue – that the ECB is an actor outside the first pillar with its three Communities, and that it can not be considered to be the central bank of the European Communities. It is claimed that the clear division made in the Treaty itself, not only in secondary law, makes it a separate entity distinct from the Community. Thus, in the famous picture of the temple structure of the EU with its three pillars, the ESCB was seen as the fourth (Selmayr 1999 p.176):

There is a newer version of these two paragraphs and the figure as of 26.3.2001

Figure 1

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This thesis relates to a French proposal of a “pilier monétaire”, which was rejected by the IGC. (Louis 1997 p.591) But although Zilioli /Selmayr in a more recent article accept that monetary policy was located in the first and central pillar, the “heart” of the European Union, it does not prevent them from representing the above diagram and from arguing

that monetary sovereignty has never been transferred to the EC, but directly from the Member States to the ECB. (Zilioli /Selmayr 2000 pp. 602, 611)

At first view, the sum total of the legal provisions cited to support the view that the ESCB's only "conceptual link" with the Community (Zilioli /Selmayr (2000) p.606)(20) appear to be convincing. They include Art 107 Para 2 EC concerning the legal personality of the ECB, the legislative power given to it by virtue of Art 110 (to make regulations, recommendations, impose fines etc), its independence of instructions (Art 108 EC), the financing out of a budget separate from that of the Community (Art 29 ESCB-Statute), and the non-applicability of Art 248 EC, as the Court of Auditors is only competent to examine the operational efficiency of the management of the ECB. (21) The ECB has the right to make recommendations in the field of external monetary matters, so that *de facto* in this field the ECB enjoys the same status as the Commission.(22) If its statute was to be changed, it would be obligatory to consult the ECB, as a disregard of this right might lead to annulment of the Treaty amendments.(23) Further to this is the notion that it is quite distinct from the usual Community agencies with legal personality, as it was established by the Heads of State or Government, thus – like the EC itself - by an international treaty and not by secondary legislation, and the fact that it is neither a Community institution nor an intergovernmental institution acting on behalf of the Community as its agent. Another point is that the ECB is not to conduct monetary policy *for* the Community, but *of* the Community,(24) a distinction which is thought to imply that the competence to conduct and implement monetary policy has not been transferred from the Member States to the Community, but directly to the ECB. It is therefore held that the ECB is outside the Community's non-contractual liability. (Zilioli/ Selmayr 2000 p.606)

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This interpretation of the Treaty provisions reminds heavily of the dispute on the legal status of the EIB in Case C-85/86, where the Court was called upon to rule in a case that concerned the flow of income taxes that were withheld from the salaries of the employees of the EIB to the Community budget.(25) In particular, the EIB argued that it was neither an institution nor a Community department. Rather, it enjoyed autonomy by virtue of its legal status, its composition and its institutional structure, and source and type of its capital would be independent of the Community budget. Thus, this case in which the Court of Justice rejected the opinion that the EIB was a third party to the Community might serve as a precedent. Therefore, when dealing with the arguments of the ECB mentioned above, it seems meaningful to highlight the conclusions drawn by Advocate-General Mancini(26) in the analogous case of the EIB. In a next step the main arguments for and against the ECB as an 'associated' (Zilioli /Selmayr 2000 p.623) body with *original* in contrast to *derivative* competencies will be discussed with reference to the case C-85/86, and the later case *SGEEM and Etroy v EIB* on the non-contractual liability.(27)

However, it is argued that there is no analogy between ECB and EIB. It is true that the ECB is diverse from the EIB in that

- the ECB's independence is explicitly mentioned and not only derived from case law as in case of the EIB,
- the EIB shall act *in the interest of the Community* when granting loans and giving guarantees to specific projects,(28) so that the EIB therefore not only legally but also in practice is a Community instrument, whereas there is no similar provision for the ECB,
- the main organ of the EIB is composed by the ministers of the Member States(29) which provides for a much stronger link to the Community as in case of the organs of the ECB, and
- the Treaty systematic lists the EIB in Part V, Institutions of the Community, whereas it does not mention the ECB there.

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Although all of these points seem to support the view that it is inadmissible to compare the EIB with the ECB, I hold that these differences in the legal norms only reflect the differences in the functions between a central bank and a bank intended to facilitate the financing of investment programs. Firstly, the fundamental analogy between the status of the EIB and of the ECB cannot be denied, and secondly, these functional differences cannot lead to the conclusion that the holding of the Court (the EIB constituted a Community body) was not applicable to the ECB.

In a next step, the main arguments invoked by the ECB – its unclear legal status (no Community institution), its legal personality, the independence of instructions, and the denial of the non-contractual liability of the Community for acts of the ECB out of the lack of an “agent” function - will therefore be answered, where appropriate, with the arguments which the Court considered as applicable to the EIB.

## 2.1. Legal Status

The EIB argued (and similarly does the ECB) that it was neither an institution of the Community nor could it be considered as an auxiliary organ similar to the Committee of the Regions or the Economic and Social Committee – such a status would be incompatible with the theory of a separation of the EIB from the Community - since it was not mentioned in Art 7 EC which exhaustively listed the Community institutions. True, this Article neither refers to the EIB which was established separately under Art 9, nor to the ECB, which was established under Art 8.(30)

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Regarding the question whether the ECB is a Community institution or not, one has to consider the reasons for not classifying it as a Community institution in accordance with Art 7 Para 1 EC. In the planning phase, it was not quite clear whether that Article should be amended by a new paragraph as proposed by the Committee of Governors (Agence Europe Documents 1990 p.18), an approach which was supported by the Commission in its proposal for a modification of the Treaty establishing the EC,(31) or if a separate new article should be introduced, as proposed by the Non-Paper of the representatives of the governments of the Member States in May 1991.(32) The latter option was the one finally realised. The explanation for the clear distinction and the exclusion from Paragraph 1 is given by the Commission in the commentary to its proposal, namely that the new institution differed in two points from the other Community institutions: (i) the institutions make part of the legal body of the international legal person “European Economic Community” and thus do not have a separate legal personality, and (ii) the administrative rules governing the “classic” institutions, in particular the financial provisions, would have been contrary to the independence of the ECB.

To be sure, this is not contrary to what will be said below on the technical grounds to give the ECB a legal personality and functional independence, but implies only that it would have been systematically inconsequent to install the ECB as a Community institution (Stadler 1996 p.94). In addition, it is questionable whether this lack of integration in the institutional structure of primary Community law means something at all, as the term *institution* ‘does not have a specific content or substance and is therefore of no assistance at the theoretical level.’(33) The German version of the Treaty consistently applies the term *organ* instead of institution,(34) which makes the underlying problem more visible, since the fundamental characteristic of an organ is that its acts are directly imputable to the organisation - the EC - of which, according to the proposition under consideration, it formed an integral part (Levi 1978 p.235). And although in case C-85/86 the General-Advocate

rejected such a classification of the EIB as organ,<sup>(35)</sup> the Court nonetheless decided that the provisions generally applicable on the taxation of Community staff were to be applied to the staff of the bank as well, due to its close link with the Community ‘as regards its objectives.’<sup>(36)</sup> When choosing this wording, the Court obviously followed the proposition of Mancini who stated that ‘the interests for which the Bank is responsible can be identified as being general interests of the Community.’<sup>(37)</sup> This, as will be seen *infra*, is of particular relevance for the ECB.

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A closer look to the parallel provisions of Art 7, Art 8 and Art 9 EC reveals the only important difference: Art 7 sets out that the Community institutions shall carry out the *tasks entrusted to the Community*, a provision which is missing in the case of EIB and ECB. Thus, the fundamental question is, whether the Bank can be *treated*, for the purposes of Article 288 EC on the non-contractual liability of the Community, as one of the Community institutions (in the sense of the German term *Organe*) even if one agrees that in a technical sense neither the EIB nor the ECB are Community institutions. This question will be considered at point 2.4.

Coming back to the status of the EIB in the framework of Community law, it has been claimed by many academic writers on this issue that the Court refrained from giving an exact definition (Stadler 1996 p.93, Smits 1997 p.92, and Selmayr 1999 p.174). However, although it did not define its position as to the EIB’s qualification as an organ, the Court of Justice nevertheless unambiguously considered the EIB to ‘constitute[s] a Community body established by the Treaty,<sup>(38)</sup> and to form[s] part of the framework of the Treaty.’<sup>(39)</sup> Thus, the Court followed the opinion of the General-Advocate who stated that

“there can no longer be any doubts as to the nature of the Bank: far from being an international body other than the EEC [...] the Bank is a specific and autonomous segment of the organisational machinery of the Community”, and “the numerous arguments adduced by the Bank to the contrary are unfounded”.<sup>(40)</sup>

## 2.2. Legal Personality

The EIB argued that the legal personality given to the by virtue of Art 266 EC enabled the bank to conclude international agreements, effectively rendering it an organisation in international law separate from the Community.

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The justification for the provision in primary legislation that gave the bank legal personality is that once it had been decided to set up the EIB ‘it was an obvious or even an obligatory step to give it legal personality, if only to enable the new body to operate within the various Member States in the same way as any other credit institution.’<sup>(41)</sup> Hence, the fact that – other than in the case of Community institutions - legal capacity was conferred on the EIB did not automatically pose it outside the Community, as the organ of a legal person may itself possess legal personality and financial autonomy, and that aspect of its status may even manifest itself outside the structure of which it is a part.<sup>(42)</sup> Plus, this granting of legal personality happens quite frequently and is never intended to put these bodies outside the Community (Torrent 1999 p.1233).

This, of course, is valid for the ECB as well, since it is not at all unusual for a central bank to have a separate legal personality from that of the State or to be given the capacity to act autonomously at the

international level (Zilioli /Selmyr 1999 p.277). Examples are most NCBs which are organised in the form of a corporation under public law and have legal personality. The weight which is given to the legal personality of the ECB is disproportionate insofar as the intention of the drafters of the Treaty clearly was to enable the bank to conduct the tasks conferred upon it, since the legal personality can not be used to exert rights and duties in an area different from those of the ESCB.(43) As a part of the legal personality of the Community like the Community institutions, it would not have been possible for the ESCB to act in the international financial markets in the same way it does now.

### 2.3. Independence

Although the independence of the EIB was not explicitly foreseen in the Treaty, the representatives of the EIB held that the structure of the EIB resembled the recognition by the authors of the Treaty that an independent body was an indispensable requirement of any activity of credit institutions, since freedom of governmental intervention means capability to win the confidence of the international capital markets. While this can be agreed with, there is no reason why the independence of the EIB should separate it from the Community and exempt it from every rule of Community law. The Court of Justice considered in particular Art 130 EEC to provide for an integration of the Bank in the Community, since the EIB was intended to contribute towards the attainment of the Community's objectives, so that it by virtue of the Treaty formed part of the framework of the Community. The Court further held, that although the position of the EIB was ambivalent

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‘in as much as it is characterised on the one hand by independence in the management of its affairs, in particular in the sphere of financial operations, and on the other by a close link with the Community **as regards its objectives**, the general rules on staff taxation should also apply to the EIB.’(44)

Hence, the judgement emphasised the integration of the EIB in the Community system through the *objectives*, which in fact are the ones of the Community and which are carried out by the bank that may also act on its own behalf. It will be showed below that this is also true for the ECB.

With respect to the ECB's independence, both the necessity of a credible commitment to the task of maintaining price stability and the higher efficiency, i.e. the assumed inability of political bodies to conduct a stability-oriented monetary policy, served as justifications for its independent status. Accordingly, the reason why the ECB was granted independence of instructions, far reaching legislative powers or a budget separate from that of the Community can be identified as being the same as in the case of the legal personality, namely purely technical considerations.(45) There is thus no reason why Mancini's conclusion for the EIB, that “these arguments have a much lower profile than the Bank thinks and maintains”,(46) should not be applicable to the ECB as well. Even Selmayr agrees with the perception that the degree of autonomy conferred upon the ECB is not an end in itself, but merely has an auxiliary function in order to enable the bank to realise the primary objective of price stability. (Selmayr 1999 p.178)

Now, it could be inferred from the lack of a Treaty norm similar to Art 267 EC for the EIB – requiring the EIB to act *in the interest of the Community* when carrying out the tasks conferred upon it – that the ECB would act in its own name and on its own behalf, would not be similarly integrated in the Community. In particular, it is the wording of Art 105 Para 2 1<sup>st</sup> indent – to define and implement the monetary policy not *for*, but *of* the Community - which is interpreted as having the far reaching consequence that the ECB carries out tasks exclusively conferred upon it, in its own responsibility and through its own organs. (Selmayr 1999 p.177)

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*Au contraire*, the wording of Article 105 which requires the ECB to act ‘in compliance with the principles set out in Art 4’ is clearly an obstacle to this interpretation that the ECB acted in its own interest instead of on behalf of the Community. In addition, it is the duty of the ESCB to support the general economic policies of the Community with a view ‘to contributing to the achievement of the objectives of the Community as laid down in Art 2.’<sup>(47)</sup> True, the ECB is only required to support the economic policies if this is possible without prejudice to the objective of price stability. Though, this can by no means be interpreted as a derogation of the ECB of the Community goals, but on the contrary provides for an integration of the ECB in the Community. In spite of the primacy of price stability, the ECB is not exempt from the (permanent) duty to contribute to the objectives of the Community, as there is no time order or a provision such as ‘once price stability is achieved, the ECB shall support the objectives of the Community’, but both aspects – economic and monetary policy - are complimentary.

## 2.4. Non-contractual Liability <sup>↑</sup>

Art 288 EC stipulates that the Community is obliged to make good any damage caused by its institutions or by its servants in the performance of their duties and which shall apply under the same conditions to damage caused by the ECB or by its servants. Though, this is claimed to be not applicable to the ECB, as the Community can not assume liability for the actions of a body which is independent of it. In the case *SGEEM and Etroy v EIB*, the Court held with reference to the EIB which is not explicitly mentioned by Art 288 EC that ‘it would be contrary to the intention of the authors of the Treaty if the Community could escape the consequences [when acting through a] Community body established by the Treaty and authorised to act in its name and on its behalf’. The Court added that the term “institution” [...] must therefore not be understood as referring only to the institution of the Community listed in Art 4 (1) of the Treaty but as also covering, with regard to the system of non-contractual liability [...] Community bodies such as the Bank.’<sup>(48)</sup>

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Despite this explicit judgement in favour of a non-contractual liability of the Community for acts of the EIB, it was argued – which is of particular importance to the ECB - that in cases where the EIB did not act as a mere *Erfüllungsgehilfin* of the Community, but independently in the management of its own affairs, e.g. on the financial markets, it was not a Community body anymore but an independent, autonomous segment of Community law, the acts of which had to be imputed to itself. The fact that the Court had recognised this ‘ambivalent position’<sup>(49)</sup> is interpreted as a support for the thesis of the clear distinction that has to be made between acts on behalf of the Community and acts on its own account. (Selmayr 1999 p.178) In other words, the ruling of the Court is believed to imply that it is the agency function or the acting on behalf of the Community that provides a close link between the EIB and the Community, and that only in this respect the Community can be held liable.

If this were true, it would be of great importance for the ECB, since the ECB may only exceptionally act as a Community agent,<sup>(50)</sup> and conducts the monetary policy not *for*, but *of* the Community. Hence, an approach under which the Community would not have to assume liability for the system, as the **ECB** is liable for the acts and decisions taken by the Council and the Executive Board (so the Committee of Governors in Agence Europe 1990 p.19) would pose a limit to the integration of the bank in the institutional framework of the Community.

The problem with this line of argumentation is, however, that it first of all underestimates the fact that the Court did not decide on the autonomous acts of the EIB – it is not at all clear how the Court would classify them -, and that it secondly misinterprets the judgement in case C-85/86 on the applicability of secondary Community law, as it is not the notion of the ambivalent position but the link via the community objectives that is the essence of the ruling. Since this link is also existent for the ECB, the functional difference between acts of the EIB on behalf of the Community and acts of the ECB in implementing the common monetary policy cannot be invoked as a valid argument. Similarly, the argument of the independence of instructions of the ECB does not rule out a non-contractual liability: Firstly, insofar as the ECB is bound to respect the rulings of the Court, it is not independent. As for the objection of a Community liability for the acts of a body which it cannot control, the comparable independence which for instance the Commission enjoys when making a proposals without that there is any possibility for the Council to exert a control did not prevent the Court from establishing nonetheless a non-contractual liability of the Community for these proposals.

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Furthermore, the argument which was adduced by the EIB in *SGEEM and Etroy v EIB* - that only if there is a lack of a legal personality, an act of a Community institution/body can be automatically attributed to the Community - was rejected by Advocate General Gulmann, by arguing that

‘.. the fact that the Court has considered the Bank to be a Community body [...] implies [...] that the Bank’s status as an independent legal person **can hardly in itself preclude** an interpretation of the second paragraph of Art 215 to the effect that the Bank can render the Community liable, subject, obviously, to the requirement that the actual manifestation of that liability, that is to say, the payment of compensation, must be made out of the Bank’s own funds and not out of the Community budget.’<sup>(51)</sup>

This pragmatic approach seems to be applicable for the ECB as well. While this takes the fact into account that Art 288 EC was amended in order to include the acts of the ECB in the non-contractual liability regime, and provides now for the attribution of ECB acts to the Community (and hence underscores the integration of the Bank in the framework of Community law), this does not mean that the Community is, not even in a subsidiary manner, liable for the damages caused by the ECB. (di Bucci 1997 p.26)

### 3. ECB as a Separate Entity?

To be sure, it is not denied hereinafter that the ECB due to the Treaty norms on its independence, the legal personality, the far reaching competencies, the financial separation from the Community budget and similar provisions, is far from being one of the ordinary Community agencies, which are usually established by secondary legislation. The point is, however, that it is not enough to simply rely on formal criteria alone, since the overall complex design of the Treaty has to be evaluated, while paying due attention to the manifold interests represented by it. The following arguments are therefore intended to elaborate on, and reject, the proposition that the ESCB is a new Community of its own, and that by maintaining price stability it pursues the single monetary policy in its own interest and not on own behalf of the Community. (See also Torrent 1999 p.14 on this issue) In the point of view presented in this article, this approach does not take account of the intention of the Drafters of the Treaty and, by relying on formalistic features, is excessive in that it overlooks that the establishment of the ECB was a means to an end of the Community.

- i. To start with a general observation on the Treaty systematic, the EC is at the same time the basis of the EC and the ECB, but “without overestimating the importance of the title and the preamble (if any) of a piece of legislation for the purposes of identifying its most characteristic subject-matter”,<sup>(52)</sup> the Treaty of Amsterdam is entitled "Treaty establishing the European Community", refers in its preamble to the Community again, and in Article 1 announces (in capital letters) the establishment of a European Community. On this prominent place it makes no mention of the ECB, but the basic provisions referring to its tasks, guiding principles and relationship vis-à-vis the Community institutions are listed in Title VII Chapter 2 and the details in the Statute. Whereas the Commission in its proposal pointed out that for clarity's sake certain regulations of the Treaty may be adopted again in the Statute,<sup>(53)</sup> this connection with the Treaty must not be ignored or shrugged off as a “certain functional” or only political proximity. The ESCB-Statutes cannot at all be interpreted as a sort of Founding Treaty. (But see Selmyr 1999 p.178)
- ii. In any event, the content of Articles 2 and 4 is most significant, as those articles list the objectives and activities of the Community. According to Art 2, the **Community** through the means of a common market and an economic and monetary union, is, among other things, to promote throughout the Community a harmonious development of economic activities, a high level of employment, sustainable and non-inflationary growth or a high degree of competitiveness. Article 4 states that the *activities of the Member States and the Community* include ‘the irrevocable fixing of exchange rates, the definition and conduct of a single monetary policy and exchange-rate policy’, and without prejudice to the primary objective of price stability, the support of ‘the general economic policies in the Community’. In doing so, Member States and Community are to comply with the guiding principles of stable prices, sound public finances and monetary conditions, and a sustainable balance of payments.<sup>(54)</sup> Thus, how could the Community conduct monetary policy if this was the exclusive competence of the ECB as a “new Community”? And the argument that this only reflected the *process* leading to the single currency (Zilioli /Selmayr 2000 p.605, n.65) - note the similarity with the Court's argumentation of the Community's special character in *Costa v. E.N.E.L*<sup>(55)</sup> - is not valid, even though ‘from the beginning of the third stage’<sup>(56)</sup> the ESCB is responsible for monetary policy. After all, by virtue of Art 121 Para 3 it is the *Community* to enter the third stage, whereas there the ECB is not mentioned there.
- iii. Art 105 EC in association with Art 111 reserves for the Community important competencies in the field of foreign exchange operations. The ECB is able to enter into international agreements, however, a general treaty making power with regard to issues of monetary policy and toy Community participation in international exchange rate systems is granted to the Ecofin-Council. The power of the ECB to act freely in this area is only secondary as it is limited to a situation where there is no formal agreement or general orientation under Art 111 Para 1 or 2. Hence, the Community reserved for itself external monetary competencies. This is contrary to the claim that the policy power was given from the Member States directly to the ESCB and not to the Community.
- iv. Art 111 Para 1 determines the formalities of an exchange rate system for the ECU in relation to ‘non-Community currencies’. To say it with the words of Torrent, ‘the interpretation that follows most easily from this expression is that the counterpart of these “non-Community currencies” would be a community currency.’ (Torrent 1999 p.1231)
- v. As to the establishment by the Heads of State or Government, this is no argument in favour of the separate nature of the ECB, but on the contrary serves as a proof of the link between the Community and the bank. After all, the Heads of State or Government for the event of the establishment of the ECB met as the Council of the EC in its highest composition. This showed the high political importance, but the Council acted in its capacity as an organ of the Community, since the establishment of EMU was one of the instruments of the Community to achieve its tasks.
- vi. What is more, all the NCBs of all Member States of the EC are members of the ECB and only these are able to be members. In the case of an enlargement, also the new Member States will

automatically become members of the ESCB, without the need to even consult the ECB. The term *Eurosystem* which was created by the ESCB to define the ECB and the 11 'in'-NCBs does *not* have a legal meaning in the sense that this System forms a new 'Community'. As all NCBs are members of the System, the extension of the monetary competence of the ECB to the area of a certain state is dependent on the membership of this state in the Community.

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Are we to take this to mean that the Bank is an instrument, a tool of the Community? This, notwithstanding its special structure, appears to be the case. The ECB is a highly independent central bank, and it has been noted that an independent central bank furnishes an extreme example of the manner in which independent agencies may be deployed both to pursue positive goals and to delimit the operations of democratically elected governments. (Everson 1995 p.188) It is true that the ECB has been given the sole responsibility for the internal monetary policy, but this task was delegated to it as the suitable Community agency to achieve the Community objectives. It is therefore not correct to define the ESCB as "Rechtsgemeinschaft" in analogy to the EC (but so Weber 1995 p.62) since such a comparison does not suffice the requirement that comparisons can only be made between bodies of the same nature or level. After all, it is the Member States who remained 'Herren der Verträge', i.e. the ones responsible for amending the Treaty if these institutional structures were considered not appropriate anymore.

In an attempt to positively define the ECB, one might say that the ECB is the regulator within the System (Art 110 EC, Art 12.1 and Art 34-ESCB-Statute) and the Council the regulator of the System (Art 105 Para 6, 106, 107 Para 5 and 6 EC). (CMLRev. 1996 p.626) Others called it a specific autonomous agency in the constellation of the EC legal order (Louis 1998 p.73) or, due to its legal personality, the first full-fledged and independent Community authority. (Smulders 1999 on Art 106 para 28) Common to these approaches is that it is regarded as possible that even an independent body which is definitely no institution made part of the framework of the Community, taking recourse, insofar to a "wide concept" of the Community. (Levi 1978 p.232) The 'special nature' which is so often attributed to the bank lies therefore - if not solely, certainly primarily - in the specific nature of the autonomy the ECB enjoys in carrying out the primary objective of maintaining price stability, as evidence of the fact that it was designed as an instrument of the Community politics.

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Thus, the ECB with its important organic (appointment) and functional (day-to-day management) link to the Community is not only the central bank within the framework of EC law and subject to the rule of the ECJ, but also the central bank *of* the EC, contributing to the achievement of the objectives of the Community. Put differently, the economic and monetary union is a means for the Community to achieve the various objectives set out in Article 2 EC.

## 4. Conclusion

To sum it up, this discussion was aimed to give an answer to the question whether the ECB, due to its legal status, is a body separate of the Community. The answer to this was negative, though, it has become clear in the course of the analysis that the ECB in fact enjoys a considerable degree of independence, which also was in the intention of the Drafters of the Treaty. Some provisions in the institutional design therefore are rightly called disproportionate, (Amttenbrink 1999 p.166) as they were intended to enable the bank to be truly independent in its decision-making, but had a different

effect.(57) In the words of Mancini, for the EIB,

‘As far as its own nature is concerned, the Bank has put forward arguments which I consider can be overcome, but which, in view of their undoubted worthiness, testify to the Bank' s good faith;’

It has become clear in the course of the analysis that even the more the ECB can substantiate its Treaty interpretation with similarly worthy arguments.

This mismatch between the highly autonomous standing of the bank and the intention of the Drafters of the Treaty can, in fact, be identified as the crucial point: Something intuitively felt and supported by political scientists is that a possible cause for so divergent the opinions is the discrepancy between the calculated consequences of a certain institutional design and the unintended consequences of bureaucratic autonomy. The table below gives an overview of such planned and unintended consequences: (adapted from Christensen 1999 p.7)

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Table 1

This table might teach us two important things. Firstly, if there is in fact a trade-off between the planned positive effects of agency autonomy and the negative side effects, than this has a serious impact on the credibility of the attempts of the ECB to present itself as a transparent, accountable body. The negative side-effects of establishing a body accumulating such a great amount of power - like unresponsiveness, unaccountability, exploitation of information asymmetries - are thus inherent in the institutional set-up within which the ECB operates.

And secondly, the self-image of the ECB transported to the stakeholders also cited by ‘separatists’ as a proof for its autonomy (Selmayr 1999 p.179) and the discussion over the separate status of the ECB vis-à-vis the Community we are quite recently observing could be explained as an attempt to maximise autonomy and is thus one of the unintended consequences of the decision to delegate the power to conduct a single monetary policy to a body independent from political interference. On the other hand, it could be only the reflection of the fears of those favouring a separation between the ECB and the Community that any argument in favour of a stronger link than an ‘association’ would lead to a subordination (Compare Zilioli /Selmayr 2000 p.622).

It will be left to the judgement of the ECJ in the case of the powers of OLAF vis-à-vis ECB and EIB to decide whether this attempt will be successful or not. However, unless there has not been a judgement of the Court from which one could deduct its standing vis-à-vis the ECB, any attempt to analyse how the Court will interpret its role as the sole interpreter of the Treaty provisions including those on monetary union comes quite close to speculation. A prognosis of the judgement of the Court is certainly not possible. It should be noted, though, that the Court of First Instance, following an application of Members of the EP, adopted interim measures and suspended parts of the EP's Rules of Procedure, which the EP amended in order to allow for investigations conducted by OLAF. While such an interim measure does not prejudice a ruling of the Court of First Instance, the reasoning for the order is interesting. In particular, the Court argued that the investigations permitted by the amended Rules of Procedure could compromise the immunity afforded to the Members of the EP by Art 10 of the Protocol on the Privileges and Immunities, which were intended to safeguard their independence in carrying out their duties and to prevent pressure. The Court did not exclude the possibility that the Protocol could protect the MEPs against certain actions by such bodies as OLAF, which could be preliminary to legal proceedings before a national court and could hinder the internal working of the EP. Specifically the fact that members of OLAF were allowed access to MEP's offices, in their absence and without their consent, led the Court to conclude that the EP's amended

rules of procedure did not contain any specific guarantee with regard to respect for the rights of the MEPs.(58)

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It will be very interesting to see whether the ECJ will adopt a similar rigid view when it comes to protecting the independence of ECB officials, and how it will deal with the investigation rights of OLAF. To be concrete, the issue is whether the ECJ which for its own relationship with OLAF did not see the need for such drastic measures as denying access as the ECB and EIB, will accept the legal justification for interfering in the internal administration of the two banks.

This article was written under the assumption that the Court used the opportunity to rule on the status of the ECB. However, this is not to say that the Court is bound to deliberate on the ECB's institutional status, nor that a rejection of the Commission's application denoted the validity of the arguments adduced by ECB officials and academic writers as to the ECB's separate status. *Au contraire*, OLAF was set up on the basis of Art 218 EC, which certainly is a weak legal basis, for there can be no doubt that neither bank is a department of the Commission. Hence, it is perfectly possible that the ECJ agrees that the "special requirements" of the ECB with regard to the confidentiality of its monetary policy decisions are so demanding that both the ECB's and the EIB's refusal to accept the jurisdiction of the Commission's agency to carry out investigations on their premises is accepted. It would add a lot of clarity, though, if the ECJ used the possibility to rule also on the institutional status of the ECB, and I therefore call with Torrent for a clear-cut decision of the ECJ, "in the interest of knowing [...] to whom the "monetary sovereignty" of the Member States has been surrendered". (Torrent 1999 p.1241)

To conclude, given the doubts academic researchers have with regard to the ability of the Court to provide for a *substantial*, not only *formal*, bondage between the ESCB and the Community, fearing that the insertion into the legal order of the Community would remain 'symbolically', (so for instance Brentford 1998 p. 100 or Nicolaysen 1993 p. 35) such a judgement would enhance confidence not only in the Court's ability to fulfil its task also with regard to monetary union, but would also add to the overall confidence in EMU. As Louis held (Louis 1997 p.595),

'Confiance dans le Juge et confiance dans les institutions sont des piliers inséparables de la construction communautaire. L'une ne va pas sans l'autre.'

And disregard of its control function is clearly not a means by which confidence in a Court can be enhanced. After all, a control by the Court merely restricted to whether the Community institutions and bodies act within their limit of discretion inevitably widens their discretionary margin and, by tolerating this increase in power, leads, *ceteris paribus*, to a loss of weight of the ECJ. (See also Schmid-Lossberg 1992 p.54)

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## Endnotes

- (1) Council Regulation 2185/96 of 11 November 1996, OJL 292, 15/11/1996, 2-5.
- (2) Commission Decision of 28 April 99/352/ EC, ECSC, Euratom, establishing the European Anti-fraud Office (OLAF), OJL 136, 31/05/1999, 20-22.
- (3) Regulation (EC) 1073/1999 of the European Parliament and the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).
- (4) Art 3, Dec 99/352.
- (5) Case C-69/89 *Nakajima v Council* [1991] ECR I-2069, paragraphs 49 and 50.
- (6) Case C-58/94 *Netherlands v Council* [1996] ECR-I 2169 paragraph 37.
- (7) Art 4 Para 2 Regulation (EC) 1073/1999 of the EP and the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), OJL 136, 31/05/1999, 1-7.
- (8) Art 6 Para 6, Reg 1073/1999.
- (9) Art 7 Para 1, Reg 1073/1999.
- (10) See 4<sup>th</sup> recital, Reg 1073/1999.
- (11) Art 4 Para 6 a and b Reg 1073/1999.
- (12) Inter-institutional agreement of 25 May 1999 between the EP, the Council and the Commission concerning internal investigations by the European Anti-fraud Office (OLAF), OJL 136, 31/05/1999, 15 –19.
- (13) Inter-institutional agreement paragraph 2, emphasis added.
- (14) This decision was not published in the Official Journal.
- (15) The European Council 'noted with satisfaction' that most of the other bodies, offices and agencies except the ECJ, the Court of Auditors, the ECB and the EIB had immediately declared their willingness to open their doors where required to an internal investigation by the Anti-Fraud Office, and considered it to be 'eminently desirable that all Community bodies should join this interinstitutional initiative,' see Conclusions of the Presidency paragraph 35, Press Release No 150/99 at <http://ue.eu.int/newsroom/main.cfm?LANG=1>.
- (16) Decision of the ECB of 7 October 1999 on fraud prevention (ECB/1999/5), OJL 291, 12/11/1999, 36-38.

- (17) So the Commission in a Press Release of 13/01/2000, Commission acts to ensure full implementation of European anti-fraud law, at <http://europa.eu.int/en/comm/spp/rapid.html> (September 2000).
- (18) So the pleas in law and main arguments of the Commission, published in OJC 122, 29/04/2000, 8. Case C-11/00 Commission v. ECB, OJC 122, 29/04/00 8.
- (19) So e.g. the Deputy General Counsel and Head of the Institutional Law Division of the ESCB, Dr. Chiara Zilioli, during a lecture held at the Wirtschaftsuniversität Wien on 27 March, 2000.
- (20) With reference to the terminology of the CoJ, cf. Case C-221/88, *ECSC v. Acciaierie Busseni SpA in liquidation* [1990] ECR I-495, para 16.
- (21) Art 27.2. ESCB-Statute.
- (22) See Art 111 Para 1 and 2 EC.
- (23) Art 48 3<sup>rd</sup> Sentence TEU.
- (24) See the wording of Art 105 Para 2 EC in association with Art 3 ESCB Statute.
- (25) Case C-85/86 *Commission v Council of Governors of the EIB*, [1988] ECR 1281.
- (26) Opinion of Mr. Advocate-General Mancini delivered on 24 Nov. 1987, [1998] ECR 1281.
- (27) Case C-370/89 *SGEEM and Roland Etroy v. EIB*, [1992] ECR 6211.
- (28) Art 267 EC.
- (29) Art 9.1. EIB-Statute.
- (30) In secondary law, however, the Rules of Procedure of the ECJ serve as an example of a provision where this distinction is not made. Art 1 defines the term "Institutions" as 'the institutions of the Communities and bodies which are established by the Treaties, or by an act adopted in implementation thereof, and which may be parties before the Court.' Accordingly, "institutions" means the institutions of the European Communities and the European Investment Bank'. This provision was changed quite recently in order to take the newly constituted ECB into account.
- (31) SEC (90) 2500 reprinted in Krägenau/Wetter 1993. pp.194.
- (32) Ibid, pp.218.
- (33) Mancini op. cit. *supra* note 26 paragraph 10.
- (34) See Art 7, Art 10, Art 11, Art 108 EC.
- (35) Mancini, op. cit. *supra* note 26 paragraph 12. The Court remained silent on this issue.
- (36) Case 85/86 op.cit. *supra* note 25 paragraph 30.
- (37) Mancini, op. cit. *supra* note 26 paragraph 10.
- (38) Case 110/75 *Mills v EIB*, [1976] ECR 955, paragraph 14.

- (39) Case 85/86 *op.cit. supra* note 25 paragraph 29.
- (40) Mancini *op. cit. supra* note 26 paragraph 13.
- (41) See Mancini *op.cit. supra* note 26, paragraph 11.
- (42) *Ibid*, for a reference of ‘most authoritative academic writings’.
- (43) This can also be derived from national law, where the acts of autonomous, self-governing bodies in spite of their distinct legal personality are only a part of the rules governing the whole state, and which therefore must be attributed to the state, since the self-governing body only exists due to delegation, see Kelsen 1966 pp.183-184.
- (44) Case 85/86, *op.cit. supra* note 25, paragraphs 29- 30, emphasis added.
- (45) The historic precedents – Bundesbank and Federal Reserve System – are thus authoritative for determining the legal position of the ECB, but see the rejection of this analogy by Zilioli /Selmayr 2000 p.625.
- (46) Mancini, *op. cit* note 26 Para 11.
- (47) Art 105 Para 1 2<sup>nd</sup> Sentence EC.
- (48) Case C-370/89, *supra* note 27 paragraph 15.
- (49) Case 85/86, *supra* note 25 paragraph 30.
- (50) See Art 21.2. ESCB-Statute.
- (51) Opinion of Mr. Advocate General Gulmann on SGEEM and Etroy v EIB, (see *supra* note 27), paragraph 13, emphasis added.
- (52) Mancini *op. cit. supra* note 26 paragraph 10.
- (53) SEC (90) 2500, reprinted in Krägenau/Wetter (1993) p. 196.
- (54) Art 4 Para 1, 2 and 3 EC.
- (55) Cf Case C 6/64 *Costa v E.N.E.L* [1964] ECR 585.
- (56) Art 116 (3) 2<sup>nd</sup> Sentence EC.
- (57) Mancini *op. cit.* see *supra* note 26 paragraph 14 a.
- (58) Press Release 32/00 of 2 May 2000, <http://curia.eu.int/en/cp/aff/cp0032en.htm>.

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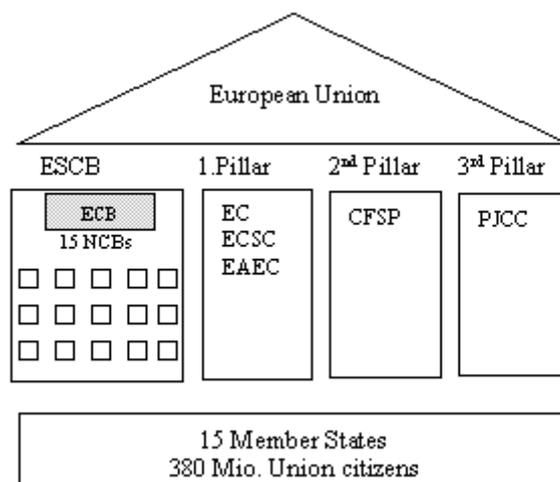
## Table I

### Planned and unintended consequences of bureaucratic autonomy

Increased bureaucratic autonomy leads to:	Planned consequences	Unintended consequences
Accumulation of power	<ul style="list-style-type: none"> <li>• Co-optation strategies</li> <li>• Organisational “mission”</li> </ul>	<ul style="list-style-type: none"> <li>• Bureaucracy exploits information asymmetries</li> <li>• Bureaucratic politics</li> </ul>
Separation from politics	<ul style="list-style-type: none"> <li>• Rule of law presupposes certainty and predictability</li> <li>• Sound monetary policies presuppose professional autonomy</li> </ul>	<ul style="list-style-type: none"> <li>• Unresponsiveness</li> <li>• Unaccountability</li> <li>• Resistance to change</li> <li>• Executives are autonomy maximizers</li> </ul>
Changes in performance	<ul style="list-style-type: none"> <li>• Bureaucracy promotes effectiveness</li> <li>• Higher efficiency</li> </ul>	<ul style="list-style-type: none"> <li>• Budget maximization</li> <li>• Slack maximization</li> </ul>

## Figure 1

### ESCB as a third party to the Community



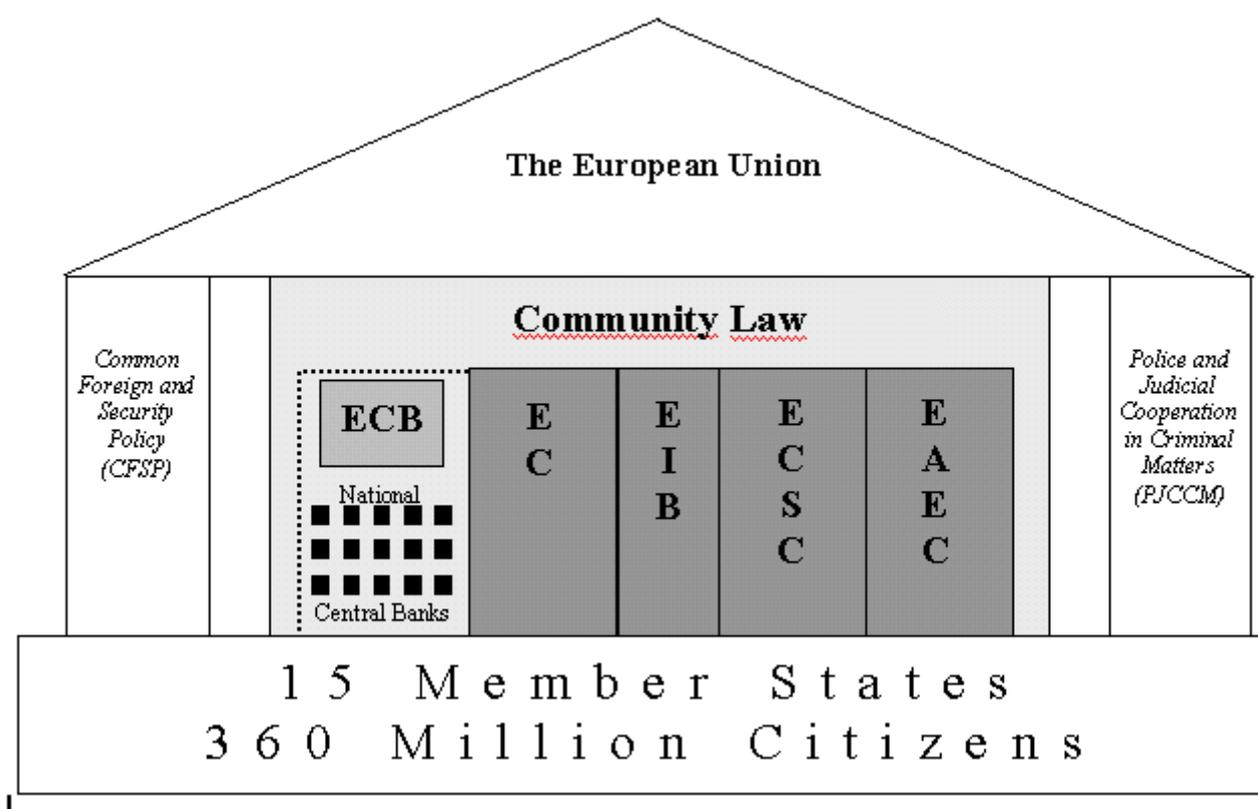
**Note that there is a new version of this figure.**

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**The following is a replacement of two paragraphs of the paper by Dutzler. The replacement was triggered by a discussion between Zilioli/Selmayr and Dutzler following the publication of the original version.**

To be concrete, it has been argued by high officials of the European System of Central Banks (hereinafter ESCB) – supported by academic writings on this issue – that the ECB was a separate actor outside the EC, a new Community of its own and that it could not be called the central bank of the European Communities. (Zilioli/Selmayr 2000 p. 622) In terms of the temple structure of the EU with three pillars, the following diagram summarizes the status of the ECB according to this thesis:

Figure 1 new (Zilioli/Selmayr 2000 624)



To be sure, this does not amount to the insertion of a "pilier monétaire" as fourth pillar as had been proposed by France, but which had been rejected by the IGC, (Louis 1997 p.591), as also Zilioli /Selmayr stressed. Though, this location of monetary policy in the first and central pillar, the "heart" of the European Union on a firm basis of Community law, would not mean that monetary sovereignty had been transferred to the EC, but, in their view, directly from the Member States to the ECB. (Zilioli /Selmayr 2000 pp. 602, 611) It was claimed that the clear division made in the Treaty itself, not only in secondary law, made it a separate entity distinct from the Community.

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